The *Oncale* Opinion: A Pansexual Response

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> *In now-familiar language, [Title VII] forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."*[1]

I. INTRODUCTION

In *Oncale v. Sundowner Offshore Services, Inc.*,[2] the United States Supreme Court ruled[3] that members of one biological sex can sue members of the same sex for sexual harassment under Title VII of the Civil Rights Act of 1964.[4] While appearing to confirm an expansive reading of Title VII, the Court's reasoning carries several important negative implications for future sexual harassment cases brought pursuant to Title VII.

First, the Court's narrow interpretation of what constitutes discrimination because of sex implies a definition of the word "sex" that includes only chromosomal, biological sex. Neither gender manifestations nor gendered behavior[5]

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1. Price Waterhouse v. Hopkins, 490 U.S. 228, 239-40 (1989) (quoting 42 U.S.C.A. §§ 2000e-2002(a)(1)-(2)).

2. 118 S. Ct. 998 (1998).

3. *Id.* at 1003. The Court did not determine whether Joseph Oncale had established a sexual harassment prima facie case. It simply remanded his case for further proceedings consistent with its opinion. *Id.* In October 1998, less than a week before trial, the remanded case settled. L. M. Sixel, *Same-Sex Harassment Suit Settled*, HOUS. CHRON., Oct. 27, 1998, at 1.

4. 42 U.S.C.A. §§ 2000e-2002(a)(1) (West 1995).

5. I use the term "gender" to refer to femininity, masculinity, and the individual and social constructions and stereotypes often associated with biological sex. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (acknowledging that "[t]he word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes"); Ronald Turner, *Same-Sex Sexual Harassment: A Call For Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151, 194-95 (1997) (distinguishing biological sex from "cultural and attitudinal gender" and arguing against conflation of the two concepts); Anita Barnes, Note, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 600-03 (1998) (defining gender to include "self-image," "stereotypes surrounding sex" and "the social construction of sex").

are included in this definition. The Court did not even use the word "gender."[6] Second, the Court's narrow interpretation arguably insinuates a *mens rea* element into the prima facie sexual harassment case, thereby threatening the viability of "sexually charged environment" cases such as *Robinson v. Jacksonville Shipyards*.[7] Third, *Oncale* misdirects judicial scrutiny to the harasser's motivations and away from the more appropriate focus on the alleged civil rights injury perpetrated. Fourth, the unanimous decision reflects and fosters traditional gender stereotypes; stereotypes that previously were found suspect in *Price Waterhouse v. Hopkins*[8] when they provide the bases for employment decisions.[9] For example, the *Oncale* Court interrelated the harasser's biological sex and sexual behavior using gender stereotypes to evaluate whether conduct directed at the target was discriminatory.[10] Finally, the Court emphasized "[c]ommon sense" and "social context" as important factors in the evaluation of suspect conduct.[11] Court endorsement of common sense and social context reestablishes the potential for prevalent, biased community attitudes to insulate discriminatory practices from attack under Title VII.

This Article exposes and explores the flaws in *Oncale*'s reasoning by first summarizing *Oncale*'s broad holding.[12] Because the Court found that offensive sexual conduct alone does not support a sex discrimination claim,[13] this Article also examines in Part IV the implications of that holding.[14] In Parts V and VI, this Article explores the motivations that the Court identified as causing sexual harassment: sexual desire and "sex-specific" animus.[15] In Part VII, this Article deals with the Court's emphasis on common sense and social context in the evaluation of harassing behavior.[16]

Throughout this Article, character equations illustrate the formulae Justice Scalia proposed for evaluating harassment. These equations reveal the Court's reliance on traditional gender stereotypes. Finally, by adopting a pansexual

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6. The Court has, in other opinions, used the terms "sex" and "gender" interchangeably. *See, e.g., J.E.B.*, 511 U.S. at 128-29 (deciding that the Equal Protection Clause prohibits discrimination on the basis of "gender"); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that Title VII was violated when "discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin"); *Price Waterhouse*, 490 U.S. at 239-41 (1989) (using the terms "sex" and "gender" interchangeably).

7. 760 F. Supp. 1486, 1493-1501, 1526-27 (1991) (describing an environment in which, inter alia, male workers posted pictures of sexual conduct and nude women, told sexual jokes, wrote abusive language on the walls and made references to sodomous rape).

8. 490 U.S. 228 (1989).

9. *Price Waterhouse*, 490 U.S. at 251.

10. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002-03 (1998).

11. *Id.* at 1003.

12. *Infra* Part III.

13. *Oncale*, 118 S. Ct. at 1002.

14. *Infra* Part IV.

15. *Oncale*, 118 S. Ct. at 1002.

16. *Infra* Part VII.

perspective, this Article proposes alternative equations for mapping and evaluating sexual harassment under Title VII.

II. BACKGROUND: DEFINING PANSEXUALITY

The term "pansexuality" is new to formal legal analysis. Formally defined:[17]

> [p]ansexuality[18] encompasses all kinds of sexuality. It differs, however, from pansexualism, a perspective that declares "all desire and interest are derived from the sex instinct."[19] Pansexuality includes heterosexuality, homosexuality, bisexuality, and sexual behavior that does not necessarily involve a coupling. It includes, for example, masturbation, celibacy, fetishism, and fantasy.[20] Moreover, pansexuality includes heteroerotic and homoerotic play and sexual aggression, sometimes mislabeled as "horseplay."[21]
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> I submit we are all pansexual, individually, and as a collective. Each individual has the ability to manifest more than one form of sexuality. Because pansexuality includes sexual fantasizing and masturbation, as well as heterosexual or homosexual coupling activity, many individuals who

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17. The following is a quotation from Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & L. 297, 300-02 (1999). The footnotes are reproduced in the locations at which they appeared in the original Essay, but have been renumbered to conform to the numerical order of this Article.

18. Pan [means] "all" or "whole." [WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1628 (1981) [hereinafter WEBSTER'S]]. Sexuality is defined as follows: "the quality or state of being sexual[;] . . . the condition, potential, or state of readiness of the organism with regard to sexual activity." *Id.* at 2082. Another possible perspective is that of unisexuality, as developed by Martine Rothblatt:

> The paradigm of sexual continuity points out that all persons are inherently bisexual but uses the term unisexual to reflect this potentiality. The term *unisexual* is used to avoid the implication that there are but two ("bi") sexes from which to choose lovers. Unisexual emphasizes the uniqueness of our sexuality and that of our lover. It also emphasizes the oneness of sexual continuity, just as the word universe means one reality full of diversity.

[MARTINE ROTHBLATT, THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER 141 (1995)]; *see also id.* at 143-48. Rothblatt's unisexuality appears very similar to the concept of pansexuality. Unisexuality's continuum seems more restrictive, however, than pansexuality's multidimensional perspective. For this reason, I prefer the term pansexual but I endorse Rothblatt's concept, which deconstructs the strict interrelation of biological sex and sexual behavior.

19. WEBSTER'S, *supra* note [18], at 1631. Pansexualism is further defined as "the suffusion of all experience and conduct with erotic feeling." *Id.*

20. Fantasizing may not constitute a "behavior" for behavioral scientists. As a scientific layperson, however, I consider thinking to be an activity, which is, in some measure, personally regulable. Moreover, I believe that thoughts, as well as observable actions, define our individual sexuality. Additionally, I include both flirtation and courtship in the list of pansexual behaviors. I consider both to be a sexualized form of social interaction that initiates sexual activity. *But cf.* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (describing "intersexual flirtation" as "ordinary socializing").

21. Horseplay is defined as "rough or boisterous play." WEBSTER'S, *supra* note [18], at 1093. Note that this definition includes neither a sexual element nor animus. *Cf. Oncale*, 118 S. Ct. at 1003. (describing "male-on-male horseplay" as "ordinary socializing").

> formerly might have fallen into one category now fit into two or more categories.
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> . . . .
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> Some individuals, who engage sexually with only one other person, may never fantasize or masturbate. Even those persons, however, may be pansexuals with moral codes that tolerate only one type of expression or behavior. For example, a priest might once have been a heterosexual who fantasized and masturbated. Even in choosing a life of celibacy, that priest is still a pansexual whose vows constrain his sexual expression. This example highlights [the fact] that individual sexuality, like religious conviction and practice, can change and evolve.[22]

Pansexuality provides a useful tool for understanding *Oncale* because, as a concept, pansexuality deconstructs the stereotypical interrelation of biological sex and sexual behavior prevalent in American society.[23] From a pansexual perspective, men do not necessarily behave in one manner and women in another. Additionally, people are not simply heterosexual, homosexual or bisexual. The pansexual perspective helps to identify stereotypical assumptions made in *Oncale*.

III. *ONCALE*'S BROAD HOLDING

"[I]n the interest of both brevity and dignity," the *Oncale* Court offered only an abbreviated recitation of the facts.[24] Joseph Oncale worked as a roustabout[25] on an

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22. *See supra* note 17 (providing the citation information for this quotation, and explaining the reason for the altered footnote numbers).

23. *See, e.g.*, THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES OUR SELVES 185 (1984) (describing prominent stereotypes that interrelate biological sex and sexual behavior). "Men are 'supposed' to know more about sex, to initiate it, to have a stronger sex drive. Women are 'supposed' to be passive recipients or willing students. Supposedly *they* want sex and *we* want love. Such rigid classifying of people by gender is false, silly and damaging." *Id.*; *see also* READER'S DIGEST, GUIDE TO LOVE & SEX 65 (Dr. Amanda Roberts & Dr. Barbara Padgett-Yawn consulting eds., 1998)

> (Sex researchers now know that fantasies play as important a part in a woman's sexual behavior as they do in a man's . . . . As a rule, more men have fantasies in which they are the dominant partner while more women imagine situations in which they play a submissive role. With fantasies, however, as with most other aspects of sexual behavior, numerous exceptions exist to such rules.)

Id. Even though Reader's Digest acknowledges numerous exceptions, it still categorizes some sexual behaviors as more typically female, and attributes others to men.

24. *Oncale*, 118 S. Ct. at 1000. Lambda supervising attorney Jon Davidson lambasted the Court for its failure to address the facts fully: "'Brevity?'. . . 'Give me a break. The Supreme Court writes opinions that are hundreds of pages long. It's not like they were running out of space.'" Jenna Ward, *High Court's* Oncale *May Cut Both Ways*, RECORDER (San Francisco, Cal.), Mar. 5, 1998, at A-1 (quoting Jon Davidson).

I agree with Davidson that the Court's failure to relate the facts reveals its "squeamishness" and "homophobia." *Id.* I also think its failure suggests a certain sexism. Justice Scalia used approximately 75 words and vague references to describe the abuse Joseph Oncale suffered. Justice Rehnquist used twice that number to describe the facts concerning Michelle Vinson's harassment in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60-61 (1986). Justice O'Connor used approximately three times that number to describe the abuse Teresa Harris

oil platform in the Gulf of Mexico.[26] His supervisor, John Lyons, together with two co-workers, physically and verbally abused Oncale in the manner described by the appellate court:

> [T]he harassment included Pippen and Johnson restraining [Oncale] while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both quid pro quo and hostile work environment sexual harassment.[27]

Oncale complained to Sundowner management but obtained no relief.[28] On one occasion, in response to Oncale's complaints, a company safety clerk "called him a name suggesting homosexuality."[29] Oncale quit after the shower incident and later explained, "'I felt that if I didn't leave my job, that [sic] I would be raped or forced to have sex.'"[30] Relying on precedent that precluded same-sex harassment relief, the appellate court dismissed the case.[31]

The Court commenced its review by confirming that Title VII protects both men and women.[32] Relying on Title VII's language and *Johnson v. Transportation Agency*,[33] in which the Court considered the discrimination claims by a male worker against his male superior, the Court reasoned that the statute does not bar same-sex suits.[34] The Court rejected circuit court cases finding both that same-sex harassment is "actionable only if the plaintiff can prove the perpetrator is homosexual (and thus motivated by sexual desire),"[35] and those holding that sexual conduct is always actionable.[36] Explaining that same-sex harassment suits will not "transform Title

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suffered in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993). Courts must relate fully the alleged abuses so that the public can understand the harm perpetrated and so that precedent reveals "all the circumstances." *Id.* at 23.

25. *See* WEBSTER'S, *supra* note [18], at 1980 (defining a "roustabout" as a "deckhand[,] a semiskilled laborer" and "one working in an oil field or refinery").

26. *Oncale*, 118 S. Ct. at 1000.

27. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

28. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001 (1998).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)).

33. 480 U.S. 616 (1987).

34. *Oncale*, 118 S. Ct. at 1001-02 (discussing Johnson v. Transp. Agency, 480 U.S. 616 (1987)).

35. *Id.* at 1002 (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996)).

36. *Id.* (rejecting McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), and Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *cert. granted and vacated*, 118 S. Ct. 1183 (1998)).

VII into a general civility code,"[37] Justice Scalia, writing for the majority, emphasized that plaintiffs must still prove first that the harassment was because of sex,[38] and second, that the harassment was "severe or pervasive enough to create an objectively hostile or abusive work environment."[39]

The Court explored several ways in which plaintiffs might prove that alleged harassment constituted "discriminat[ion] . . . because of . . . sex."[40] Justice Scalia suggested that proof of the perpetrator's sex-specific desire or proof of hostility would demonstrate discriminatory motivation.[41] Alternately, he implied that evidence of disparate treatment of male and female workers would supply the necessary proof.[42] Notably, each method involves proving the harasser's motivation—indicative of intent—or intent itself.[43] Each method also suggests that "sex" means only chromosomal, biological sex: not gender. Additionally, Justice Scalia emphasized that sexual conduct alone does not demonstrate discrimination because of sex.[44]

Finally, the Court elaborated on the requirement that the harassment be severe or pervasive.[45] It affirmed its holdings in *Meritor Savings Bank v. Vinson*[46] and *Harris v. Forklift Systems, Inc.*[47] by holding "that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[48] The Court introduced the notion, however, that "common sense" and "social context" play a role in the objective analysis of harassing behaviors.[49]

IV. DEFINING SEXUAL HARASSMENT BY PERPETRATOR MOTIVATIONS RATHER THAN CONDUCT

In *Oncale*, the Court focused on the harasser's motivations—whether determined by sex-specific desire or animus—rather than on the nature of the injury to identify discriminatory conduct.[50] This change of focus risks altering the prima

37. *Id.* at 1002.
38. *Id.*
39. *Id.* at 1003 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
40. *Id.* at 1002 (quoting 42 U.S.C.A. §§ 2000e-2002(a)(1)-(2)) (alteration in original).
41. *Id.*
42. *See id.* (explaining that "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace").
43. In *McDonnell v. Green*, 411 U.S. 792 (1973), the Court specified that when direct evidence of discriminatory intent is not available, plaintiffs must prove discriminatory intent in disparate treatment cases by using circumstantial evidence. *Id.* at 802.
44. *Oncale*, 118 S. Ct. at 1002.
45. *Id.* at 1003.
46. 477 U.S. 57.
47. 510 U.S. 17.
48. *Oncale*, 118 S. Ct. at 1003 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).
49. *Id.*
50. *Id.* at 1002.

facie case in sexual harassment cases. Never before has the law required a *mens rea* element in such cases.[51] Courts have correctly concentrated on the conduct and nature of the injury—the civil rights violation—and not on the perpetrator's intent. For example, in *Robinson v. Jacksonville Shipyards*,[52] what the men intended when they posted pictures of nude or partially clad women in the workplace did not matter.[53] The men may have been conforming mindlessly to habits established as a matter of social custom, but they demeaned women by denying them the opportunity to work in an environment free of gender stereotyping and the objectification of women.[54] In *Robinson*, Judge Melton explained:

> A third category of actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex . . . . This third category describes behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment.[55]

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51. *See generally* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (enumerating the prima facie elements for co-worker harassment:

> Five elements comprise a claim of sexual discrimination based on the existence of a hostile work environment: (1) plaintiff belongs to a protected category; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) respondeat superior, that is, defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.).

For situations involving supervisor harassment with no tangible employment action, the Court has modified only the fifth element of the prima facie case. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998) (holding employers vicariously liable for such harassment, subject to an affirmative defense: an anti-harassment policy that an employee unreasonably failed to invoke); Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2279 (1998) (same).

52. 760 F. Supp. 1486 (M.D. Fla.1991).

53. *Id.* at 1522-23.

54. An approach to sexual harassment that focuses on the conduct and resulting injuries, and not on the harasser's motivations, may attract the First Amendment free speech defense. An examination of the First Amendment defense is beyond the scope of this Article, but was addressed and rejected by Judge Melton in the *Robinson* case. He explained in part:

> [T]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment. *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[P]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.") . . . . In this respect, the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish.

Robinson, 760 F. Supp. at 1535 (alteration in original) (citations omitted) (parallel citations omitted); *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992) (explaining that, under Title VII, "government does not target conduct on the basis of its expressive content"); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (confirming the *R.A.V.* Court's determination that Title VII permissibly regulates conduct in a content-neutral fashion).

55. *Robinson*, 760 F. Supp. at 1522-23 (citations omitted).

This holding demonstrates that the behavior itself, separate and apart from the motivations of the perpetrator, discriminates. The proliferation of nude pictures and literature in a sexually charged environment[56] has a disparate impact on women in that it objectifies and demeans them. Such a workplace has a different but arguably objectionable impact on men in that it fosters a male stereotype and enforces the rule that men either appreciate or should tolerate this objectification of women. The prima facie elements in a disparate impact case do not include proof of intent.[57] A simple character equation maps this reasoning:

(♂ or ♀) + ∞*SEX*∞ + (♂ or ♀) =
actionable harassment because of sex [58]

Particularly because sexual behavior itself has been actionable, courts have sanctioned sexually charged workplaces only if the sexual harassment has surpassed a high threshold. Specifically, the behavior must have been severe or pervasive and offensive to the reasonable person, as well as to the individual victim.[59]

Two negative consequences result if the harasser's intent becomes an element of the sexual harassment prima facie case. First, the sexual harassment plaintiff's burden of proof increases exponentially. Proving conduct is a much easier task than proving conduct *and* intent. Second, an entire subset of hostile work environment behaviors—those which make for a sexually charged work environment—might no longer be actionable. More specifically, because many workers who post nude pictures or pervasively make lewd jokes have no specific intent to target the victims, and in fact may impact both men and women, their sexually charged and offensive actions may fall from the list of offending behaviors.

Might the *Oncale* Court possibly have intended to eliminate the sexually charged workplace from the list of actionable offenses? In *Oncale*, Justice Scalia declared:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have a sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed

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56. The character equations herein use the symbol "∞*SEX*∞" to refer to the phrase "sexually charged environment." For further explanation, see the accompanying Appendix.

57. International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

58. The accompanying Appendix provides a symbol legend.

59. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

> to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[60]

The Supreme Court may never have found discrimination solely from sexual words or behaviors, but lower courts such as the *Robinson* court have done so for years by finding that workplaces replete with nude posters, sexual objects, sexual banter, and lewd jokes violate Title VII.[61] Moreover, the Court's attitude regarding offensive sexual behavior contradicts its position concerning hostile behavior. The Court rejected the notion that sexual behavior alone can demonstrate discrimination, but in the same brief opinion suggested that "a trier of fact might reasonably find such discrimination . . . [when] sex-specific derogatory terms . . . make it clear that the harasser is motivated by general hostility" toward that sex.[62]

By vacating *Doe v. City of Belleville*[63] and rejecting the possibility that severe or pervasive sexual conduct alone constitutes sexual harassment and, therefore, sex discrimination, the Court eliminated the only form of hostile work environment behavior that does *not* bear an associated mental state or motivation. Arguably, then, when Justice Scalia required a finding of discrimination "because of . . . sex,"[64] he added a *mens rea* element to the sexual harassment prima facie case.

V. SEXUAL HARASSMENT MOTIVATED BY SEXUAL DESIRE

Having rejected sexual conduct alone as sufficient to demonstrate discrimination, the *Oncale* Court then examined conduct motivated by sex-specific desire. Justice Scalia suggested that social context would influence the interpretation of the particular behaviors.[65] Justice Scalia reasoned that if a male perpetrator proposed sexual activity, either explicitly or implicitly, to a female target, courts could reasonably presume that the harassment was because of sex.

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60. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

61. *E.g.*, Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991); *see* Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998) (reasoning that "when one's genitals are grabbed, when one is denigrated in gender specific-language, and when one is threatened with sexual assault, it would seem . . . impossible to de-link the harassment from the gender of the individual harassed"); Shrout v. Black Clawson Co., 689 F. Supp. 774, 779-80 (S.D. Ohio 1988) (discussing a sexually suggestive magazine); Boyd v. James S. Hayes Living Health Care Agency, 671 F. Supp. 1155, 1158-59 (W.D. Tenn. 1987) (concerning a pornographic movie and the distribution of pornographic literature); Barbetta v. Chemlawn Servs. Corp., 699 F. Supp. 569, 573 (W.D.N.Y. 1987) (addressing, among other things, pornographic magazines, vulgar comments, sexually oriented pictures in a slide presentation and sexually oriented calendars).

62. *Oncale*, 118 S. Ct. at 1002; *see also infra* note 89 and accompanying text (commenting upon the Court's inquiry into sex-specific animus).

63. 119 F.3d 563 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998).

64. *Oncale*, 118 S. Ct. at 1002.

65. *Id.* at 1003.

The Court added, "[I]t is reasonable to assume those proposals would not have been made to someone of the same sex."[66] Similarly, if credible evidence suggested that a male perpetrator was homosexual and he proposed sexual activity to a male target, courts could reasonably conclude that the harassment was because of sex.[67] Character equations map the Court's reasoning:

Hetero♂ + *SEX* + ♀ = actionable harassment because of sex //
Hetero♀ + *SEX* + ♂ = actionable harassment because of sex [68]

Hetero♂ + *SEX* + ♂ ≠ actionable harassment because of sex //
Hetero♀ + *SEX* + ♀ ≠ actionable harassment because of sex

Homo♂ + *SEX* + ♂ = actionable harassment because of sex //
Homo♀ + *SEX* + ♀ = actionable harassment because of sex

The Court's reasoning carries several important implications. First, implied but unstated in Justice Scalia's opinion is the notion that courts may presume that perpetrators are heterosexual unless proven homosexual. Such a presumption reflects a heterocentrist world view and completely ignores the case of the bisexual or equal opportunity harasser.[69] To apply Justice Scalia's reasoning in that situation, one must determine "'whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not*

66. *Id.* at 1002.

67. *Id.* Because the presumption attached to inter-sex behavior is not available for intra-sex offenses, plaintiffs in same-sex cases suffer a more onerous burden of proof. Erin J. Law, Oncale v. Sundowner Offshore Services, Inc.*: The United States Supreme Court Holds That Same-Sex Sexual Harassment Is Actionable Under Title VII*, 73 TUL. L. REV. 723, 735 (1998).

68. The Court referred to "male-female sexual harassment situations." *Oncale*, 118 S. Ct. at 1002. While such phrasing conceivably includes female sexual predation, common interpretation might lead to the conclusion that the Court expected sexual predators to be men. Assuming that the Court meant to connote a sex-neutral interpretation, however, I have included the example of the female harasser in the character equations.

69. The term "equal opportunity harasser" is not new to this analysis. This term was utilized in two briefs submitted to the Supreme Court in conjunction with the *Oncale* case: Brief of Nation Organization on Male Sexual Victimization, Inc. at 22, *Oncale* (No. 96-568), *available in* 1997 WL 471814 [hereinafter Male Sexual Victimization Brief]; and Brief of Lambda Legal Defense and Education Fund at 21-23, *Oncale* (No. 95-568).

exposed.'"[70] Arguably, bisexual harassers avoid liability under Title VII because they target both men and women. Thus, their behavior is not discrimination because of sex:

(Bi♂ or Bi♀) + *SEX* + (♂ & ♀) ≠ actionable harassment because of sex

Some courts have recognized that the equal opportunity harasser's behavior occurs because of sex in that it discriminates against *both* men and women.[71] One can make an analogy to race cases to explain this reasoning, just as *Oncale* relied on race case precedent to explain that a person can discriminate against someone of the same sex.[72] For example, in a race case, a perpetrator who discriminates against African Americans, Asians, and whites by using different racial epithets is no less racist than one who discriminates against only one race. Likewise, an equal opportunity harasser is no less a discriminator than the equal opportunity racist. Arguably, a perpetrator who calls all workers, regardless of race, "niggers" discriminates, and is liable to any person so called.[73] Similarly, a perpetrator who refers to his co-workers as "pussies" harasses, regardless of each target's sex.[74] The scenario of the equal opportunity harasser and the arguments that address this

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70. *Oncale*, 118 S. Ct. at 1002 (emphasis added) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). One wonders how the Court defined "exposure." For example, an employee might be exposed to offensive conduct without being the target of it. Alternatively, one might argue that an employee who is aware of harassment but not the target of it is not exposed to it. I think Justice Scalia meant the second, more narrow definition. This narrow definition is inconsistent, however, with Equal Employment Opportunity Commission policy, which recognizes the standing of any employee protesting employer discrimination. *See* Allen v. American Home Foods, Inc., 644 F. Supp. 1553, 1557 (N.D. Ind. 1986) (holding that "[t]he EEOC interprets Title VII to afford standing to anyone protesting any form of alleged employer discrimination, on the theory that all employees have a right to work in an atmosphere free from unlawful employment practices").

71. *See, e.g.*, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (holding that a reasonable woman might be affected differently than a reasonable man); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (stating that a harasser who abused all employees might have been more abusive to women than men).

72. *Oncale*, 118 S. Ct. at 1001 (citing Casteneda v. Partida, 430 U.S. 482, 499 (1977)).

73. *See* Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679-80 (8th Cir. 1989) (holding that a white employee may bring a hostile work environment claim against an employer that engaged in discrimination against African American employees).

74. According to the Equal Employment Opportunity Commission's Policy Guidance on Sexual Favoritism, both men and women may sue when confronted with an "atmosphere demeaning to women" if they can establish that the conduct was severe or pervasive enough to create a hostile working environment. 8 FAIR EMPLOYMENT PRACTICE MANUAL (BNA) part C, at 405:6819-21 (1990); *see also* Sims v. Montgomery County Comm., 766 F. Supp. 1052, 1074 (M.D. Ala. 1990) (deciding that the harassment against women created a hostile environment for "those male officers who harbor a respect and concern for all their fellow officers, irrespective of their sex, and who find offensive to their conscience . . . an environment in which all officers . . . cannot share equally in the opportunities of employment").

situation reveal the flawed and underinclusive nature of the *Oncale* reasoning and its heterocentrist perspective.

The Court's second assumption, that heterosexuals do not make sexual advances toward persons of the same sex, suggests that in same-sex-sexual-advance cases, courts may find only homosexuals liable. In fact, perpetrators who have active heterosexual lives and who self-identify as heterosexuals may find erotic and sexually stimulating the same-sex sexual advances and aggressions committed against Joseph Oncale.[75] To deny the possibility that heterosexuals can find homoerotic advances and aggressions stimulating, Justice Scalia ignores his own advice in *Oncale*: "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."[76]

Additionally, the presumptions that perpetrators are heterosexual unless proven otherwise, and that only homosexuals make actionable sexual advances to persons of the same sex, encourage the exploitation of homophobic attitudes by increasing the chance that plaintiffs, as well as others, will label perpetrators in same-sex cases as homosexual—even when they are not.[77] Reports indicate that the parties in *Oncale* were all heterosexual.[78] However, Joseph Oncale accused his harassers of being homosexual: "I feel that they made homosexual advances toward me. I feel they are homosexuals."[79] Clearly, such labeling can change the interpretation of the harassers' behaviors in *Oncale*'s heterocentrist world, as illustrated by the preceding character equations.

Justice Scalia's requirement that credible evidence of homosexuality justify a presumption of discrimination in same-sex cases may not save many heterosexuals from being labeled homosexual. What constitutes credible evidence of homosexuality? For example, is a man who masturbates homosexual? Maybe not. Is a man who has sexual fantasies of other men homosexual? Is a man who has experienced sexual arousal from homoerotic literature homosexual? Is a man who has had one sexual encounter with another man homosexual? Surely, a man who is married is heterosexual, right? Not necessarily. Author Carren Strock discovered

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75. Both the Supreme Court and the appellate courts noted that Oncale's supervisor threatened him with rape. *Oncale*, 118 S. Ct. at 1001; Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998). While the threat of rape constitutes a threat of sexual violence, courts may also deem it a sexual advance. *Oncale*, 118 S. Ct. at 1001; *Oncale*, 83 F.3d at 118; *see also infra* note 103 and accompanying text (noting that homoerotic play and aggression have not been studied).

76. *Oncale*, 118 S. Ct. at 1001 (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

77. "The Fifth Circuit described the threats to Oncale as 'threats of homosexual rape' but did not address sexual orientation, Oncale, 83 F.3d at 118, nor do the certified questions in this case state an issue of homosexuality as such." Male Sexual Victimization Brief, *supra* note 69, at 23 n.7.

78. *The Right Law?*, NAT'L L.J., Oct. 20, 1997, at A26; Richard Carelli, *Supreme Court Hears Arguments In Same-Sex Harassment*, DAILY REC. (Baltimore, Md.), Dec. 4, 1997, at 14; Petitioner's Brief at 18-19, *Oncale*, (No. 96-568), *available in* 1997 WL 458826.

79. Male Sexual Victimization Brief, *supra* note 69, at 23 n.7 (quoting Oncale Deposition, Jan. 20, 1995 at 41:23-24).

after 25 years of marriage to a man that she was a lesbian.[80] Moreover, people who appear less masculine or feminine than "typical" heterosexuals may attract the homosexual label, as did Joseph Oncale from the Sundowner safety clerk.[81] *Oncale* invites an epidemic of investigations regarding the perpetrator's sexuality in sexual harassment cases, but courts may have trouble defining an individual's sexuality.

Like Justice Scalia, who presumes that perpetrators are heterosexual unless proven homosexual and that heterosexual men make sexual advances only toward women, many Americans interrelate biological sex and sexuality using traditional gender stereotypes.[82] The presumption is that "real" men and women, who deserve the protection of Title VII, are heterosexual. Psychologists have discussed this interrelation when studying male sexual harassment targets:

> It is not effeminate men's gender or gay men's "affectional preference" *per se* that is targeted; if it were, then perpetrators would harass *everyone* who appears feminine or [appears] to prefer a male sexual partner to a female sexual partner—women as well as men. Rather, it is the fact that the target is a *man* who is presumed to prefer a male sexual partner or who looks or acts "effeminate" that the perpetrators find objectionable; it is this interaction of biological sex and behavior that forms the basis of their actions.[83]

This passage demonstrates the interrelation between gender stereotyping and biological sex and behavior. Those courts that exclude homosexuals and transgendered persons from Title VII protection mistakenly fail to recognize the interrelation between sex and sexual behavior based on stereotypes.[84]

In *Oncale*, the Court failed to recognize that it interrelated the perpetrator's sex and sexual behavior using narrow gender stereotypes to define discrimination "because of . . . sex."[85] The character equations illustrating Justice Scalia's reasoning reveal the gender stereotyping, and show that many sexual offenses that fail to fit the narrow categories will remain unaddressed. For example, *Oncale* may prevent the application of Title VII in a case in which a heterosexual man makes sexual advances toward an effeminate heterosexual man in order to demean and

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80. Carren Strock, *My Turn: A Painful Discovery*, NEWSWEEK, May 8, 1998, at 16; *see generally* CARREN STROCK, MARRIED WOMEN WHO LOVE WOMEN (1998) (discussing the reasons that some married women are lesbians).

81. *See supra* text accompanying note 29 (noting that Joseph Oncale was labeled homosexual by a co-worker).

82. *See supra* text accompanying note 23 (detailing the prevailing American stereotypes).

83. Craig R. Waldo et al., *Are Men Sexually Harassed? If So, by Whom?*, 22 LAW & HUM. BEHAV. 59, 63 (1998).

84. *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding that "Title VII does not prohibit discrimination against homosexuals").

85. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

disempower the effeminate man in the workplace.[86] In such a case, the perpetrators are not motivated by sexual desire, but perhaps by the desire to reinforce their own traditional masculinity and associated power, or by animosity directed at nonconformist gender: male effeminacy. Because the animosity does not extend to *all* men, the target may have no recourse.

Such reasoning creates a tension between *Oncale* and *Price Waterhouse v. Hopkins*.[87] In *Price Waterhouse*, an accounting firm failed to promote Anne Hopkins to partner because she failed, in part, to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[88] The Court determined that discrimination by gender stereotyping is sex discrimination:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[89]

This passage confirms that employers requiring employees to behave according to traditional gender stereotypes, and those sanctioning such a requirement by co-workers, violate Title VII. Thus arises the following character equation:

$$(\male \text{ \&/or } \female) + ((\textit{stereo}\male\textit{enforce} + \male) \text{ \&/or } (\textit{stereo}\female\textit{enforce} + \female)) = \text{actionable harassment because of sex}$$

86. Ironically, this scenario closely resembles the *Oncale* fact pattern.

87. 490 U.S. 228 (1989). In *Price Waterhouse*, the Court stated, "We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today." *Id.* at 248.

88. *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part & rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *aff'd*, 490 U.S. 228 (1989)).

89. *Id.* at 251 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))); *see also Oncale*, 118 S. Ct. at 1001 ("We have held that [Title VII] not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986))). *But see Price Waterhouse*, 490 U.S. at 294 ("I think it is important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm.") (Kennedy, J., dissenting).

Because *Oncale* used gender stereotypes to interrelate the perpetrator's biological sex with sexual behavior to identify discriminatory motivation, the opinion is arguably inconsistent with the holding in *Price Waterhouse*. Similarly, a court that refuses to acknowledge the civil rights injury perpetrated against effeminate men, homosexuals, transgendered persons, and bisexuals violates *Price Waterhouse* and, arguably, Title VII.

A new approach exists that could reconcile *Price Waterhouse* and the evaluation of sexual harassment. A perspective that assumes all employees (and employers) are pansexual deconstructs the gendered, stereotypical interrelation between biological sex and sexual behavior. Pansexuals who make offensive sexual advances to pansexual men or women, whether severely or pervasively, discriminate because of sex. Mapped in character equations, this is as follows:

♂ + *SEX* + ♀ = because of sex // ♀ + *SEX* + ♂ = actionable harassment because of sex [90]

♂ + *SEX* + ♂ = because of sex // ♀ + *SEX* + ♀ = actionable harassment because of sex

or

(♂ &/or ♀) + *SEX* + (♂ &/or ♀) = actionable harassment because of sex

These equations are identical to several noted earlier that represent Justice Scalia's formulae for sex-specific, desire-motivated harassment, except that the gender-stereotyped orientation labels for the perpetrators have been removed. "Real" men and women are not always heterosexual; bisexuals can discriminate against both men and women; heterosexuals may obtain sexual gratification from behaviors with persons of the same sex; and homosexuals are not necessarily satisfying sexual desires if they engage in same-sex behaviors "commonly" found objectively

90. As with other forms of hostile-work-environment harassment, the plaintiff still must prove in the prima facie case that: (1) the behavior constituted objectively "severe or pervasive" harassment; and (2) the plaintiff subjectively found that harassment to have been offensive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

acceptable between heterosexuals.[91] Ironically, these equations reveal from a pansexual perspective that sexual advances—as manifested by conduct alone—can indicate discrimination because of sex.

If we are all truly pansexual, then the sex of the harasser should make no difference in Title VII harassment equations. One could not presume that men who harass women *intend* to do so because of the targets' sex. Moreover, pansexuality rescues us from the knotty task of unweaving and identifying all the behaviors that can constitute homosexuality, and can thereby distinguish a homosexual from a heterosexual. Pansexuality, applied in the sex discrimination context, forces us to focus on the alleged civil rights injury perpetrated rather than on the harasser's motivations or sex.[92] It redirects our focus onto demeaning sexual or hostile behavior that injures men or women by denying them the employment opportunities enjoyed by workers who exhibit different or nonconformist sex traits or practices. Finally, the pansexual perspective works in scenarios other than sexual desire cases.

VI. SEXUAL HARASSMENT MOTIVATED BY GENDER HOSTILITY

In *Oncale*, the Court evaluated the perpetrator's sexuality to detect sexual desire and define conduct "because of . . . sex." However, because all the *Oncale* parties were self-identified heterosexuals, Justice Scalia's sexual desire formulae, which was based on gender stereotypes, did not apply. Therefore, the Court also explored sex-specific animus to define offensive conduct.[93] The Court reasoned that hostility toward a particular sex might motivate a harasser to speak in sex-specific

91. For example, the homosexual football coach may not be making a sexual advance toward a player when he smacks that player's buttocks. Conceivably, the coach is simply camouflaging his homosexual identity by emulating the behaviors of heterosexual coaches. *See Oncale*, 118 S. Ct. at 1002-03 (raising the scenario of the (presumably heterosexual) coach smacking a player on the field, and finding no abuse).

92. Compare sex discrimination to race discrimination. Did it really matter whether the bus driver who told Rosa Parks to sit at the back of the bus *intended* to discriminate against her because she was African American? No. Neither did it matter what *his*, the bus driver's, race or sexual orientation or religious beliefs were. The civil rights injury commenced with the driver's conduct and resulted in Ms. Parks' insult.

93. *Oncale*, 118 S. Ct. at 1002.

derogatory terms or otherwise treat persons of one sex differently from persons of the other sex. Again, character equations track the Court's reasoning:

(♂ and/or ♀) + ♂*hostility* + ♂ = actionable harassment because of sex //
(♂ and/or ♀) + ♀*hostility* + ♀ = actionable harassment because of sex

Upon first glance, these equations do not appear to contain the problematic stereotypes of the first ones. Look more closely, however. These equations carry a latent heterocentrist perspective. Another way to craft them is as follows:

(♂ and/or ♀) + (♂*hostility* + Hetero♂) or (♀*hostility* + Hetero♀) =
actionable harassment because of sex

If the target is homosexual, most courts will refuse to invoke Title VII's protections.[94] Therefore,

> (♂*hostility* + Homo♂) = (*homohostility* + Homo♂) ≠
> actionable harassment because of sex

> (♀*hostility* + Homo♀) = (*homohostility* + Homo♀) ≠
> actionable harassment because of sex

Courts have ruled that harassment targeting homosexuals constitutes harassment not because of sex, but because of sexual orientation.[95] Title VII does not protect against discrimination because of sexual orientation.[96] Thus, only heterosexuals enjoy Title VII protection.[97] In sex-specific animus cases, as in sex-specific desire cases, stereotypical notions concerning sexuality govern the determination of discrimination "because of . . . sex."

94. *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc. 876 F.2d 69, 70 (8th Cir. 1989) (holding that Title VII does not prohibit discrimination against homosexuals).

95. DeSaints v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979). In 1996, Congress defeated, by one vote, the Employee Non-Discrimination Act (ENDA), legislation that would have added sexual orientation to the list of characteristics recognized under Title VII. David E. Rovella, *Gay Groups Are Angry at Sexual Preference Ruling*, NAT'L L.J., Nov. 10, 1997, at A9.

96. 42 U.S.C.A. §§ 2000e-2002(a)(1)-(2).

97. Let us entertain this query: what would happen if males, hoping to exclude women from the males' workplace, engaged in hostile behavior with all heterosexual women but not with the lone lesbian? Could these men avoid liability for gender animus claiming that they were hostile only to heterosexuals and not all women and, therefore, that Title VII does not apply to their behavior?

If the Court were to take a pansexual perspective, the sexuality of the parties would not matter because the Court would assume all parties to be pansexual. The Court could adopt an orientation-neutral perspective, devoid of gender stereotyping:

(♂ and/or ♀) + ((♂*hostility* + ♂) &/or (♀*hostility* + ♀)) = actionable harassment because of sex [98]

With a pansexual perspective, the original sex-specific animus equation carries no latent stereotyping.

VII. SEXUAL HARASSMENT DETERMINED BY COMMON SENSE AND SOCIAL CONTEXT

The hypothetical Justice Scalia crafted to clarify the Court's point regarding the influence of context in *Oncale* aptly demonstrates *Oncale*'s flaws, and invites further exploration of the pansexual perspective. Justice Scalia reasoned, "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."[99] In this hypothetical, Justice Scalia assumes that: (1) the football coach is male; (2) the male football coach is heterosexual; (3) the football player is male; and (4) butt-smacking on a football field is not sexual whereas it is either sexual or hostile at the office. Taking a pansexual, gender-neutral approach, we would acknowledge that: (1) male coaches are sometimes homosexual (in addition to being pansexual); (2) coaches are occasionally female; (3) women play professional sports; and (4) on-field butt-smacking may be sexual (or hostile).

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98. Note that this equation specifies that the hostility directed toward men is sex-specific and is not the same as the hostility directed toward women. Random hostility is not actionable; it is not illegal for an employer to be a jerk. One can imagine a scenario, however, in which a perpetrator targets effeminate men and all women. *See, e.g.*, Vicki Shultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1787-88 & n.534 (1998). Such a scenario would be expressed in the form of the following equation:

♂ + (*stereo♂enforce* + ♂*hostility* + ♂) + (♀*hostility* + ♀) = actionable harassment because of sex

99. *Oncale*, 118 S. Ct. at 1003. I acknowledge that "buttocks" is the formal, polite term for the gluteus maximus; however, I use the less stilted, slang form, "butt," to portray more descriptively the behavior of butt-smacking.

If Justice Scalia's coach were homosexual, would butt-smacking still be nonsexual? Some male players might not feel comfortable having their butts smacked by a homosexual coach. To those players, butt-smacking might then connote a sexual advance, just as it would in Justice Scalia's hypothetical office. Using Justice Scalia's formulae, courts could reasonably conclude that a homosexual male coach sexually harasses a male player by smacking his butt. However, what if this homosexual coach did not intend the contact to be sexual? What if he merely smacked male butts, as some heterosexual coaches do, to give praise, support and encouragement? Justice Scalia's list of stereotypes does not include the "innocent" homosexual who engages in behavior perpetrated regularly by heterosexuals. Using *Oncale*'s reasoning, a court could discriminate against homosexuals for engaging in exactly the same behaviors in which heterosexuals engage.

Using a pansexual perspective to evaluate the male coach's behavior, one would focus not on his motivation or sexuality, but on the conduct and alleged injury. Obviously, the case arises only if someone finds butt-smacking offensive.[100] Justice Scalia assumes that on-field butt-smacking is not a sexual behavior—but is this assumption true from a pansexual perspective? How we interpret butt-smacking can affect the outcome of seemingly identical cases. Justice Scalia assumes that male-male butt-smacking is nonsexual because, in part, he assumes the actors are heterosexual. Perhaps butt-smacking is homoerotic play, however. Homophobic actors and observers will refuse to characterize behavior as homoerotic when doing so could call into question their own, perhaps rigidly self-defined, sexuality.

Alternatively, on-field butt-smacking could signal, in a sexual manner, the type of dominance and power that enforces traditional male stereotypes. "Such behavior can be interpreted as arising from the societal devaluation of femininity and the complementary valorization of male heterosexuality and masculinity."[101] In their recent study of sexually harassed men, Craig Waldo, Jennifer Berdahl and Louise Fitzgerald found:

> [M]en reported that other men were more likely than women to target them for sexual harassment. Men . . . were significantly more likely to experience lewd comments and enforcement of the male gender role from other men than from women. . . . Similar results were found in [another sample group] . . . . [A third sample of men showed] a comparable pattern of results . . . , with the exception that men in this group were more likely to report experiences of unwanted sexual attention from women and were

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100. Only unwelcome conduct is actionable as harassment under Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' 29 CFR § 1604.11(a) (1985).").

101. Waldo et al., *supra* note 83, at 61.

> not more likely [but rather, were equally likely] to experience enforcement of the male gender role from other men.[102]

I contacted both Fitzgerald and Waldo to inquire whether anyone had studied homoerotic play or aggression in the context of sexual harassment, and both reported that the phenomenon had not been investigated.[103] Until we have research confirming that male-male, on-field butt-smacking is conduct that no "reasonable person in the plaintiff's position would find severely hostile or abusive [or pervasive,]"[104] we should not blindly adopt Justice Scalia's personal calculus and dicta. The pansexual perspective protects male professional football players, male construction workers and other traditionally "macho" workers who find butt-smacking just as demeaning, insulting and intimately invasive as do many male and female clerical workers.

The female coach raises the same sexual desire issues that the homosexual male coach presents. If a female coach engages in butt-smacking of male players, some players—and possibly their wives or partners—may consider that behavior to be a sexual advance. It is not clear that the playing field neutralizes the butt-smacking. Using the Court's formulae, females making sexual advances towards males is reasonably actionable. In this situation, courts would have to discriminate against women by finding them liable for the exact same behavior for which male heterosexual coaches would not be held liable.

Finally, women may perceive workplace butt-smacking to be a sexual gesture no matter where the coach performs it. By permitting such behavior, even between men, courts reinforce the message that professional sports happen on a "man's field," and unless women are prepared for butt-smacking, they need not apply.

Examine the scenario of the female sports player. Using Justice Scalia's "reasonable" presumptions, when a male coach smacks a female player on the buttocks, is the behavior actionable? Indeed, the behavior is not actionable if the female player plays on a "coed" team and the coach is an equal opportunity butt-smacker, whether or not the behavior signifies a sexual advance. The behavior might be actionable if she plays on a female team, depending again on whether the behavior constitutes sexual behavior. In Justice Scalia's hypothetical, social context dictates that male-male on-field butt-smacking is nonsexual. That may or may not be true. However, what about male-female butt-smacking on the field? Is that also nonsexual? How do we know if we do not assume that all male coaches are

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102. *Id.* at 69-70. Waldo et al. also found that most men in their sample experienced the enforcement of heterosexual gender roles as the most upsetting, possibly justifying the labeling of that behavior as sexual harassment. *Id.* at 74.

103. Electronic mail from Louise Fitzgerald to Jennifer Drobac (May 1998) (copy on file with the *McGeorge Law Review*); Electronic mail from Craig Waldo to Jennifer Drobac (May 1998) (copy on file with the *McGeorge Law Review*).

104. *Oncale*, 118 S. Ct. at 1003.

homosexual? If butt-smacking ever carries a sexual message—and Justice Scalia concedes that it does in the office—then courts could reasonably conclude that a male coach who smacks a female player on a female team is harassing her because of her sex. Thus, on-field butt-smacking perpetrated in the context of a female team constitutes sexual harassment, but the exact same behavior is not sexual harassment when performed with a "coed" team or with a team consisting of a heterosexual coach and "real" men. A gender-neutral, pansexual approach would avoid some of the ridiculous and discriminatory pitfalls that result when traditional stereotypes, disguised as "social context,"and prejudices, disguised as "common sense," pollute the discrimination equation.

VIII. CONCLUSION

"The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[105] Clearly, the offensive conduct and nature of the injury uniquely identify sexual harassment. *Oncale* misplaces the focus on the harasser's motivations, sexual or hostile. Its narrow interpretation of what constitutes discrimination because of sex threatens the future of "sexually charged workplace" litigation, and arguably insinuates a *mens rea* requirement into the proof of the sexual harassment prima facie case. Additionally, the court's opinion interrelated biological sex and sexual behavior by using gender stereotypes to determine whether discrimination "because of . . . sex" occurred. Stereotypes—both latent and apparent—corrupt *Oncale*'s reasoning and lead to seemingly ridiculous and inconsistent results. Finally, *Oncale*'s unprecedented and ill-advised reliance on "common sense" and "social context" threatens the vitality of Title VII, the civil rights statute passed to correct situations in which "common sense" and "social context" fail to protect all persons.

Oncale's broad holding—that same-sex sexual harassment is actionable under Title VII—offers great hope for victims of sexual harassment. With a pansexual, gender-neutral perspective, courts can ferret out discriminatory behaviors without encountering the traps evident in the *Oncale* reasoning. The equations consistent with a pansexual approach assist in the identification of discrimination *because of sex.*

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105. *Id.*

First is the *Price Waterhouse* equation that represents illegal gender stereotyping:

(♂ &/or ♀) + ((*stereo*♂*enforce* + ♂) &/or (*stereo*♀ *enforce* + ♀)) = actionable harassment because of sex

Next is the equation that represents severe or pervasive sexual advances:

(♂ &/or ♀) + *SEX* + (♂ &/or ♀) = actionable harassment because of sex

Third is the equation that represents sex-specific animus:

(♂ &/or ♀) + ((♂*hostility* + ♂) &/or (♀*hostility* + ♀)) = actionable harassment because of sex

And finally comes the equation that represents severely or pervasively sexually charged workplaces:

(♂ or ♀) + ∞*SEX*∞ + (♂ or ♀) = actionable harassment because of sex

Courts that use these equations to identify discrimination because of sex will avoid the heterocentrist, sexist and gendered stereotypes that mar *Oncale*.

THE *Oncale* OPINION, APPENDIX 1

Symbol or Abbreviation	**Definition**
♂	man or men
♀	woman or women
Hetero	heterosexual
Homo	homosexual
Bi	bisexual
∞*SEX*∞	infinitely sexual, a sexually charged work environment
SEX	sexual advances or sexual activity
stereo♂enforce	enforcement of male stereotypes
stereo♀enforce	enforcement of female stereotypes
♂hostility	hostility directed against men
♀hostility	hostility directed against women
homohostility	hostility directed against homosexuals